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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 477.

BOSTON AND MAINE RAILROAD,
Petitioner,

v.

FRED ARMBURG,
Respondent.

BRIEF, AMICUS CURIAE

(In behalf of the Petitioner).

JOHN M. GIBBONS,
EUGENE J. PHILLIPS,
HENRY W. LAWLOR.

Supreme Court of the United States

BOSTON & MAINE R. R.
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v.

FRED ARMBURG,
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Statement

This brief is filed by leave of this Honorable Court, and with the consent of counsel for the petitioner and the respondent. We have attempted to supplement the argument of the petitioner upon the points as set out in their brief.

In the opinion of the Supreme Judicial Court of Massachusetts filed on September 12, 1931, Advance Sheets p. 1759, the provisions of the Workmen's Compensation Act, General Laws of Massachusetts, Chapter 152, were held applicable to railroads engaged in interstate and intrastate transportation. This law was held constitutional by the Supreme Judicial Court of Massachusetts in The Opinion of the Justices, 209 Mass. at p. 607. The provisions of the Workmen's Compensation Act of Massachusetts has not been reviewed by this Court in any prior proceeding involving its constitutionality.

Although the construction of the statute adopted by the state court of last resort is binding upon this Court, it is not concluded by its reasoning but must exercise an independent judgment when called upon to determine the federal question as to whether the Act as construed and applied is repugnant to the restrictions of the provisions of the Constitution of the United States or its amendments.

Ward & Gow v. *Krinsky*, 259 U.S. 503.

See also *Atchison T. & S.F. Ry. Co.* v. *Railroad Commission*, 51 S.C. Rep. 553.

In this proceeding the petitioner is challenging the validity of a state enactment on the ground that it is repugnant to the commerce clause and it is not necessarily bound by the legislative declarations of purpose. It is open to the petitioner to show that in their practical operation provisions of the said Workmen's Compensation Act directly burden or destroy interstate commerce.

Foster-Fountain Packing Company v. *Haydel*, 278 U.S. 1.

The decision of the state court in this instance being in contravention of the legislation of Congress to regulate

interstate commerce was adverse to the petitioner and, therefore, gives rise to the right of review in this Court.

Pennsylvania R.R. Co. v. *Hughes,* 191 U.S. 477.

By numerous decisions this Court has held that in the absence of congressional legislation the state may constitutionally impose taxes, enact inspection laws, quarantine laws, and, generally, laws of internal police, although they may have an incidental effect upon interstate commerce. But, the commerce clause of the Constitution, of its own force, restricts the state from imposing direct burdens upon interstate commerce.

Missouri ex. rel. v. *Kansas Natural Gas. Co.,* 265 U.S. 298.

And "It is elementary that a state may tax property in order to carry on interstate commerce. But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a state may not tax, burden or interfere with such commerce or tax as such gross earnings derived therefrom or impose a license fee or other burden upon the occupation or the privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end. *Pullman Co.* v. *Richardson,* 261 U.S. 330, 338, and cases cited. And it must appear that one engaged exclusively in interstate business would not be subject to the imposition, and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business." *Sprout* v. *South Bend,* 277 U.S. 163, 171, and cases cited.

New Jersey Bell Tel. Co. v. *State Board of Taxes,* 280 U.S. 338, 346.

In the case of *United States Express Co.* v. *Minnesota*, 223 U.S. 335, 345 which upheld the constitutionality of a Minnesota act taxing express companies, this Court said:

> "The right of the state to tax property, although it is used in interstate commerce, is thoroughly settled" . . . "The difficulty has been, and is, to distinguish between legitimate attempts to exert the taxing power of the state and those laws which, although in the guise of taxation, impose real burdens upon interstate commerce as such." and at page 347, that the act in question would "not fall within that class of statutes uniformly condemned in this court, which show a manifest attempt to burden the conduct of interstate commerce, such power, of course, being beyond the authority of the state." And, in this decision the language used by Justice Holmes in *Maine* v. *Grand Trunk R. Co.*, 142 U.S. 217 was quoted from as follows:
>
> "On the other hand, the state cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can."

In the opinion of this Court in the case of *Louisiana Public Service Commission, et al,* v. *Interstate Commerce Commission,* decided November 23, 1931, it was said:

> "The power of Congress to regulate interstate and foreign commerce is exclusive and has no limitations other than such as arise from the Constitution itself. *Gibbons* v. *Ogden,* 9 Wheat. 1, 197. The Congress may

adopt measures effectually to prevent every unreasonable, undue or unjust obstruction to, burden upon or discrimination against interstate commerce whether it results from state regulation or the voluntary acts of carriers."

From the decisions in these cases referred to above and other cases of a similar nature involving state tax laws, it will be observed that such laws are valid when applied solely to commerce within a state and not a direct burden upon the commerce itself.

Citizens National Bank v. *Durr*, 257 U.S. 99.
New York, New Haven & Hartford R.R. Co. v. *New York*, 165 U.S. 628.
Missouri v. *Kansas Gas Co.*, 265 U.S. 298, 307.
East Ohio Gas Co. v. *Tax Commission of Ohio*, 51 S.C. Rep., 499.
Hanley v. *Kansas City S.R. Co.*, 187 U.S. 617.
Oklahoma v. *Wells Fargo & Co.*, 223 U.S. 298.
Kansas City Ry. v. *Kansas*, 240 U.S. 227.
Shafer v. *Farmers Grain Co.*, 268 U.S. 189.
Massachusetts v. *Western Union Tel. Co.*, 136 U.S. 40.

"And while interstate commerce can not be regulated by a state by the laying of taxes thereon, in any form, *yet whenever the subjects of taxation can be separated* (italics ours) so that that which arise from interstate commerce can be distinguished from that which arise from commerce wholly within the state, the distinction will be acted upon by the courts, and the state permitted to collect that arising upon commerce solely within its own territory."

Lehigh Valley R. Co. v. *Pennsylvania*, 145 U.S. 200.

In the case of *Garvey* v. *Wesson*, 258 Mass. 48, the Supreme Judicial Court of Massachusetts said:

"If the transaction was, in and of itself, foreign commerce, we have no doubt that the demurrers should have been sustained. This court has, in substance, determined that the statutes (Sts. 1884, c. 330; 1895, c. 157; 1900, c. 280; 1903, c. 437) which go to make up the present G.L.c. 181, sec. 5, are not to be taken to apply to foreign corporations engaged solely in interstate commerce. *Attorney General* v. *Electric Storage Battery Co.* 188 Mass. 239, 240, 241, citing *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U.S. 196, *Norfolk & Western Railroad* v. *Pennsylvania*, 136 U.S. 114. They otherwise would be unconstitutional. The same reasoning applies in reference to a corporation engaged solely in foreign commerce. United States Const. Art. 1, sec. 8. A State statute which by its necessary operation directly interferes with or burdens such commerce is a prohibited regulation and is invalid regardless of the purpose for which it was enacted. *Schafer* v. *Farmers Grain Co.* 268 U.S. 189, and cases cited.

"The exceptions of debts and contracts which relate to interstate commerce, made by the statute, does not necessarily except also such debts and contracts as relate to foreign commerce. Congress by its legislation has swept into interstate commerce many transactions which have only an incidental relation thereto; but which, by the exercise of that legislative power have been made part of interstate commerce, and, thereby, have been placed beyond the control of State legislation. It has not so dealt with foreign commerce, and until it acts, there is still opportunity for valid action by the State Legislature.

"Had the Supreme Court of the United States decided that such transactions formed part of foreign commerce, or were so directly connected with it that any State legislation necessarily burdened or interfered with it, of course we should acquiesce."

In *Baltic Mining Company* v. *Massachusetts*, 231 U.S. 68, 83, affirming 207 Mass. 381, 212 Mass. 35, this Court said:

"It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive Federal authority over it. A resort to the receipts of property or capital employed, in part at least, in interstate commerce, when such receipts or capital are not taxed as such but are taken as a mere measure of a tax of lawful authority within the state, has been sustained."

* * * * *

At p. 84.

"Construing the act in question, the Supreme Judicial Court of Massachusetts has held that it does not apply to corporations engaged in railroad, telegraph, telephone, etc. business, which are taxed on another plan under the provisions of the statute. It is held not to apply to corporations whose business is interstate commerce, or who carry on interstate and intrastate business in such close connection that the intrastate business cannot be abandoned without serious impairment of the interstate business of the corporation."

Western Union Tel. Co. v. *Kansas, ex rel, Coleman*, 216 U.S. 1.

Pullman Company v. *Kansas, ex rel, Coleman*, 216 U.S. 56.

See *McCall* v. *California*, 136 U.S. 104; and *Crutcher* v. *Kentucky*, 141 U.S. 47, involving state statutes which were held unconstitutional as being repugnant to Clause 3, Section 8, Article 1 of the Constitution of the United States, commonly known as the Commerce Clause.

We desire also to refer to the language which this Court used in the case of *Beer Co.* v. *Massachusetts*, 97 U.S. 25, in which it was said that the question as to the paramount authority of the Constitution and laws of the United States relating to the regulation of commerce with foreign nations and among the several states, or otherwise, did not arise.

The legislative action of the states must not be arbitrary or unreasonable when considered upon the ground of its effect upon the Constitution and the laws of the United States.

See C.R.I. & P. Ry. v. *Perry*, 259 U.S. 548.
General Ry. Signal Co. v. *Virginia*, 246 U.S. 500.
Fort Smith Light Co. v. *Paving District*, 274 U.S. 387.

The following quotation is from the decision of this Court in *Truax* v. *Corrigan*, 257 U.S. 312, 329;

> "This doctrine is supposed to find support in the case of *N.Y.C.R.R. Co.* v. *White*, 243 U.S. 188, 198; Ann. Cas. 1917D, 629; 13 N.C.C.A. 943, and cases there cited. These cases, all of them, relate to the liabilities of employers to employees growing out of the relation of employment for injuries received in the course of employment. They concern legislation as to the incidents of that relation. They affirm the power of the state to vary the rules of common law as to the fellow-servant doctrine, assumption of risk, and negligence in that relation. They hold that employers have no vested right in

those rules of the common law. . . . It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the 14th Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power, whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles."

In the case of *Hayes Wheel Co.* v. *American Dist. Co.*, 257 Fed. 881, 259 U.S. 62, certiorari denied, which upheld the constitutionality of a Michigan statute imposing a franchise tax on foreign corporations, Section 8 of which excluded sales which would be protected by the rights of interstate commerce, that Court said:

"The Supreme Court of Michigan has construed the statute as making unenforceable a contract made before compliance with the statute. This declaration of invalidity must be recognized by the courts, state or federal in whatever state suit may be brought for its enforcement. . . . applying these principles concretely, the statute is bad if it attempts to impose a tax upon all plaintiff's capital, whether employed in state or interstate commerce or if it assumes to impose a license or franchise fee upon business done in the state without distinction between state and interstate business.

"On the other hand, the authority of the state to restrict the right of plaintiff corporation to engage in business within its limits, or to sue in its courts, so long

as interstate commerce is not thereby burdened, is well settled; . . . and the mere fact that plaintiff is engaged in interstate commerce does not exempt its property from state taxation . . . and the state business is thus capable of separation from the interstate."

See International Paper Co. v. *Massachusetts*, 246 U.S. 135, 144.

It will thus be seen that the decisions of this Court have held certain state laws as constitutional which are in the nature of tax laws, and other state laws as unconstitutional, upon the ground as to whether or not the said laws were repugnant to the commerce clause of the Constitution of the United States. These cases and there are, of course, many other similar cases that might be referred to here, have some bearing upon the questions for review by this Court in the instant case. There is, however, a difference which is easily distinguishable in that laws which are applicable to foreign corporations in connection with the doing of business in a particular state are based upon the value of the property, or the income from the business of such corporations which is wholly confined to intrastate commerce, while under the provisions of the Workmen's Compensation Act of Massachusetts, which requires all employers to carry insurance with private insurance companies, the separation of the employees of a railroad company engaged in both interstate and intrastate commerce in Massachusetts *must separate, for the purposes of insuring, all of its employees who are not engaged in interstate commerce.*

In this connection the following language is quoted from the decision in *Smith, et al* v. *Illinois Commerce Commission*, 282 U.S. 133, 149.

"In view of the questions presented in this case, the validity of the order of the state commission can be suitably tested only by an appropriate determination of the value of the property employed in the intrastate business and of the compensation receivable for the rates prescribed."

The vital question before the Supreme Court of Massachusetts in the decision of the Armburg case was whether or not the provisions of the Workmen's Compensation Act were applicable to employees of railroad companies injured within the scope of their employment while engaged wholly in intrastate commerce and the decision of this court in the case of *Second Employers' Liability Cases,* 223 U.S. 1, involved the same principle as to the constitutionality of the act of Congress relating to railroad employees engaged in interstate commerce. The following language in the last mentioned decision at p. 51 is here quoted:

"The second objection proceeds upon the theory that, even although Congress has power to regulate the liability of a carrier for injuries sustained by one employee through the negligence of another, where all are engaged in interstate commerce, that power does not embrace instances where the negligent employee is engaged in intrastate commerce. But this is a mistaken theory, in that it treats the source of the injury, *rather than its effect upon interstate commerce,* (italics ours) as the criterion of congressional power.

* * * * *

"The present act, unlike the one condemned in Employers' Liability Cases (Howard v. Illinois C.R. Co.) 207 U.S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; *deals*

only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employees while engaged in such commerce." (Italics ours.)

At p. 54, quoting from *Smith* v. *Alabama*, 124 U.S. 465, 473,

"It follows that any legislation of a state, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority."

* * * * *

At p. 55.

"The inaction of Congress, however, in no wise affected its power over the subject."

* * * * *

At p. 56.

"And now that Congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is."

* * * * *

At p. 58.

"It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by the Chief Justice Taney, in the case of Ableman v. Booth, 21 How. 506, 16 L. ed. 169; and hence the state courts have no power to revise the action of the Federal courts, nor the Federal the state, except where the Federal Constitution or laws are involved."

In *Panama R. Co.* v. *Johnson*, 264 U.S. 375, 392, this Court said:

> "The national legislation respecting injuries to railway employees engaged in interstate and foreign commerce which it adopts has a uniform operation, and neither is nor can be depleted therefrom by local statutes or local views of common law rules.
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> * * * * *
>
> "There are many instances in the law where a person entitled to sue may choose between alternative measures of redress and modes of enforcement; and this has been true since before the Constitution."

In *Sonsmith* v. *Pere Marquette R.R.*, 173 Mich. 57, at p. 73, the Court said:

> "The Federal statute of 1906 . . . applied to every common carrier engaged in interstate commerce . . . and the first section of the act was not otherwise unlike the present section of the Michigan statute. By a divided court it was held in 207 U.S. 463 that it was unconstitutional as applied to commerce among the several states, because providing that in such service the common carrier should be liable to any of its employees. The act was construed by the majority of the judges to mean *any employee*, whether employed in interstate or intrastate business of the corporation.

At p. 88.

> "It will be noted that the statute of South Dakota applies to every common carrier and to all employees of common carriers, as did the Federal act of 1906, while the Michigan statute applies to a single class of common carriers, namely, railroads. Much that is said in argument in the opinion in the *Westby* case, in con-

demnation of the South Dakota law, sustains the classification made in the Michigan law."

There have been numerous decisions of this Court in regard to state laws covering injuries to railroad employees only in which the constitutionality of same have been upheld in this Court.

C.B. & Q. Ry. v. *McGuire,* 219 U.S. 549.
Missouri Pacific Ry. Co. v. *Castle,* 224 U.S. 541.
M.J. & K.C.R.R. v. *Turnispeed,* 219 U.S. 35.
C.I. & L. Ry. v. *Hackett,* 228 U.S. 559.

The general principle of the modification of the common law rights and liabilities of employers and employees of railroads has been involved in state legislation for many years and such legislation, we believe, when incorporated within the provisions of the Workmen's Compensation Acts must be considered upon a different ground than special legislation by the states outside of Workmen's Compensation Acts. The cases cited above are in relation to special legislation of this nature, while the case of *N.Y.C.R.R. Co.* v. *White,* 243 U.S. 188, affirming 216 N.Y. 653, is a sample of a state Workmen's Compensation Act which removes the common law defenses of employers who fail to secure the payment of compensation.

The Workmen's Compensation Act of 1910, Ch. 674, of New York, was held unconstitutional in 201 N.Y. 271 because in conflict with the due process of law provisions of the State Constitution and of the 14th amendment. The 1914 act was held not in violation of the 14th Amendment, and in the decision of this Court it was said at p. 209:

"No question is made but that the terms imposed upon this railroad company were reasonable in view of the magnitude of its operations, the number of its employees, and the amount of its payroll (about fifty-

seven million annually); hence no criterion of the practical effect of the third class is suggested."

This Act was held as elective and in the case of *Mountain Timber Co.* v. *Washington*, 243 U.S. 219, which held the Washington Workmen's Compensation Act of 1911 constitutional, this Court said:

> "However, so far as the interests of employees and their dependents are concerned, this act is not distinguishable in any point raising a constitutional difficulty from the New York Workmen's Compensation Act, sustained in *N.Y.C.R.R. Co.* v. *White*, decided this day. It is true that in the Washington act the state fund is the sole source from which the compensation shall be paid, whereas the New York act gives to the employer an option to secure the compensation either through state insurance, insurance with an authorized insurance company, or by a deposit of securities with the State Commission. But we find here no ground for a distinction unfavorable to the Washington law."

And in the dissenting opinion by Justice McKenna in *Arizona Employers' Liability Cases*, 250 U.S. 400, 437, it was said:

> "In the New York compensation law passed on in *N.Y.C.R.R. Co.* v. *White*, 243 U.S. 188, there were 42 groups of hazardous occupations. In *Mountain Timber Co.* v. *Washington*, 243 U.S. 219, the court had quite a struggle with the provisions of the Workmen's Compensation law, which was so far different from those of the other cases as to incur the dissent of members of the court."

At this point we desire to stress the fundamental differences that naturally exist between workmen's compensation acts of a compulsory form as contrasted to the elec-

tive form, and we believe the language used in the case of *Sheehan Pipe Line Construction Co.* v. *State Industrial Commission* (Okla.) 3 P. 2d, 199, is quite appropriate:

> "A well-reasoned opinion is found in the case of *North Alaska Salmon Co.* v. *Pillsbury,* 174 Cal. 1. . . . There is a manifest difference between a compulsory act, like ours, and elective acts, like the Roseberry Act of 1911, and various statutes in other states, under which the compensation provisions are dependent upon the election or consent of the employer and the employee. . . . Under a compulsory statute, however, the correlative rights and obligations are not founded upon contract. Nor do they correspond with the legal conception of a tort, since a liability is imposed without regard to the element of wrongdoing on the part of the person charged."

In the decisions of this Court where the provisions of Workmen's Compensation Acts of various states have been reviewed, they have been held not a violation of the provisions of the Constitution of the United States upon other than the commerce clause, and have been held by this Court to be elective rather than compulsory in regard to the provisions of the employer to come within the terms of the Act. In *Jones' Digest of Workmen's Compensation Laws in United States and Territories, with Annotations, Twelfth Edition, December 1, 1931,* it is interesting to note on page IX under the head "Insurance or Other Securities" that among the seven states classified under the head of "Insurance Compulsory," the Massachusetts Act is included.

We contend that this is as it should be, notwithstanding the fact that in decisions of the Supreme Judicial Court of Massachusetts the Massachusetts Act has been held elective; and that this Court is not bound by this construction,

having been placed thereon by that Court for the reasons as set forth herein on page one of this brief.

In the case of *Hawkins* v. *Bleakly*, 243 U.S. 210, affirming 220 Fed. 378, which was a bill in Equity to restrain enforcement of the provisions of the *Iowa* Workmen's Compensation Act, it is recognized that this Court used the following language.

> "As to private employers, it is an elective workmen's compensation law, having the same general features found in the recent legislation of many of the states, sustained by their courts. (Citations.) And acceptance of the terms of the act being presumed unless employer or employee gives notice of an election to reject them. *To this main purpose no constitutional objection is raised, the attack being confined to particular provisions of the law.* (Italics ours.)
>
> "Some of appellant's objections are based upon the ground that the employer is subjected to a species of duress in order to compel him to accept the compensation features of the act; . . . But it is clear, as we have pointed out in *N.Y.C.R.R. Co.* v. *White*, decided this day, that the employer has no vested right to have these so-called common law defenses perpetuated for his benefit, and that the 14th Amendment does not prevent a state from establishing a system of workmen's compensation without the consent of the employer, incidentally abolishing the defenses referred to."

But the petitioner herein attacks the validity of the Massachusetts Workmen's Compensation Act as affecting railroads engaged in interstate and intrastate commerce upon the ground that same is in violation of the commerce clause of the Constitution of the United States, which has not been

urged in the consideration of any other Workmen's Compensation Act by this Court up to the present time.

In the Armburg opinion at pp. 1756, 1757, the court said:

> "It is often a question of difficulty whether a particular injury arose out of intrastate or interstate commerce. That difficulty exists quite apart from the act and is not enhanced by its provisions. It is inherent in the complexities of the business of conducting a railroad in different States and transacting both intrastate and interstate business. There are differences in certain instances as to the persons entitled to recovery and the persons to whom the amount recovered may ultimately be payable under the Federal employers' liability act and under the workmen's compensation act. These and other differences appear to us to constitute merely difficulties of a kind not infrequently encountered in the practical administration of affairs, but not to amount to insurmountable obstacles in the way of construing the scope of the statute according to its words and purpose.
>
> "The same employees may be engaged alternately during stated periods in intrastate and in interstate commerce. It may not be possible for the defendant to make a rigid classification of its employees between those engaged in intrastate and those engaged in interstate commerce, or to separate the two kinds of traffic. That is not required."

It is our contention that the language of the act under consideration is more consistent with the terms of the Workmen's Compensation Act of a compulsory rather than of an elective nature and this opinion is further confirmed by a consideration of the provisions of the Act so far as employers are concerned. It will be admitted that

the only election under this Act on the part of employees can only be exercised after the employer has become an insurer under the Act; therefore, if elective, the election, or option, is in the employer only.

The original Act of 1911, Chapter 751, Part IV was entitled "Massachusetts Employees Insurance Association" and General Laws, Acts of 1915, Ch. 287, was entitled "An Act Providing That Workmen's Compensation Insurance Policies shall be subject to Approval by the Insurance Commissioner";

Acts of 1916, Chapter 200, "An Act relative to Workmen's Compensation and Liability Insurance." Sec. 1. Any mutual liability company authorized to do business in this Commonwealth may, with the approval of the insurance commissioner, have and exercise any or all of the rights, powers and privileges relating to the transaction of the business of workmen's compensation insurance by law vested in or conferred upon the Massachusetts Employees Insurance Association."

Acts of 1931, Ch. 426, Sec. 251:

> (6) "Insured or Insured persons" an employer who has provided insurance for the payment to his employees by an insurer of the compensation provided by this chapter."
>
> Sec. 252, 1 (7) "Insurer" any insurance company authorized so to do which has contracted with an employer to pay the compensation provided for by this chapter."

From which it will be seen that the insurance requirements as affecting employers is confined to private mutual insurance companies doing business in Massachusetts, and that there is no state fund to which employers can contribute as in the case of *Middleton* v. *Texas Power & Light*

Co., 249 U.S. 152, confirming 108 Texas 96, and consequently we contend that a railroad company engaged in interstate and intrastate commerce cannot be denied its common law defenses in actions by employees while engaged at the time of the accident in intrastate commerce because of its failure to become an insurer under the provisions of the Massachusetts Workmen's Compensation Act.

In the Armburg opinion at p. 1754, the court said:

> "If it had been the intent of the Legislature to exclude railroads engaged in interstate commerce from the operation of the act, it would have been a simple matter to state that intent in unequivocal language. The words, purpose, and legislative history of the act as now phrased require the conclusion that it was intended to be applicable to all classes of injuries therein described within the competency of the legislative department."

In most all the compensation acts of the various states a provision is made for a written notice to be filed by the employer to the effect that it has elected to come within the provisions of the Act or that an election is presumed by the employer, but in nearly every such Act, railroads engaged in interstate commerce are specially excepted and in the case of Minnesota, North Carolina, North Dakota, Texas, Virginia and Washington, all employees of railroads are excepted.

By Acts of 1913, Chapter 568, the Massachusetts Workmen's Compensation Act was amended by inserting the clause "Except masters of and seamen on vessels engaged in interstate or foreign commerce. See Section 1 (Clause 4) of General Laws, Chapter 152."

See *Morrison* v. *Commercial Towboat Co.*, 227 Mass. 237.

In the Armburg opinion at p. 1755 the court said:

"There are numerous cases where decisions of State courts have been reversed because recovery had been allowed under workmen's compensation laws when, as the United States Supreme Court held, the injury had occurred while the employee was engaged in interstate commerce and where, therefore, the State laws were inapplicable and the Federal employers' liability act governed the rights and liabilities of the parties. *New York Central Railroad Co.* v. *Winfield*, 244 U.S. 147. *New York Central Railroad Co.* v. *Porter*, 249 U.S. 168. *Southern Pacific Co.* v. *Industrial Accident Commission*, 251 U.S. 259. See, also, *American Railroad Co.* v. *Birch*, 224 U.S. 547. It does not appear to have been suggested in any of these decisions that railroad corporations were not subject to State workmen's compensation acts as to their intrastate business."

Gillard's Case, 244 Mass. 47, 51.

General Railway Signal Co. v. *Virginia*, 246 U.S. 500.

Fort Smith Light Co. v. *Paving District*, 274 U.S. 387.

C.R.I. & P. Ry. Co. v. *Perry*, 259 U.S. 548, 556.

We believe that the same necessity which required the exception in the case of seamen engaged in interstate and foreign commerce attaches to employees of railroad companies engaged in interstate commerce, as the exclusive jurisdiction in congressional legislation is as broad in each class, and the failure to except railroad employees engaged in interstate commerce is wholly arbitrary and unreasonable.

In *Keaney's Case*, 217 Mass. 5, 8, which related to insurance covering farm laborers which are excepted under Section 67 of said Act, the Supreme Judicial Court of Massachusetts said as follows:

> "On the other hand, if he does not desire to make it available for all of his employees, there is no insuperable objection to his undertaking an insurance for a limited portion of them."

and in the Armburg opinion at p. 1756,

> "The act does not require, and the decision in the *Cox* case does not mean, that an employer must insure branches or departments or kinds of business which for any reason are not within the jurisdiction of the General Court and thus necessarily outside the scope of the act. An employer, conducting some business within the jurisdiction of the General Court and other business outside that jurisdiction, may insure under the act with respect to his employees in the part of his business within that jurisdiction and secure with respect to them all the benefits of the act unaffected by the circumstance that he continues to conduct the part of his business outside that jurisdiction without such insurance; and he may continue to conduct this latter part of his business under the principles of legal obligation governing it, free from any effect flowing from insurance under the act as to the other part of his business conducted within the jurisdiction of the General Court."

The difficulties (including expenses of trial) of determining whether a railroad employee was engaged in interstate commerce are well known and it cannot be denied that the great majority of railroad employees are most of the time engaged in interstate commerce and that the employees of

other than carriers by railroad are never so engaged, which is the reason undoubtedly that most workmen's compensation acts do make an exception of railroad employees.

As the Massachusetts Act does not except employees engaged in interstate commerce there is no question but that railroad companies in Massachusetts engaged in interstate commerce may be liable under the provisions of other statutes affecting railroads if the provisions of the Workmen's Compensation Act are held applicable to such railroads. In the decision in the Armburg case, Advance Sheets 1931, at p. 1758, the Court said:

"The liability established by said Section 3 is punitive in nature; the penalty is to be assessed solely to the degree of culpability of the defendant, or its agents or servants, and it co-exists now as always hitherto with the liability for death established by the Employers' Liability Act. G.L.c. 229, secs. 4, 7, 8, 9, 10. G.L.c. 153. The measure of damages and the basis of liability are different under said Section 3 and under said Section 9." Sections 3 and 9 are of G.L.c. 229, covering the penalty for causing death of an employee are as follows:

> "Section 3. If a corporation operating a railroad, street railway or electric railroad, by reason of its negligence or of the unfitness or negligence of its agents or servants while engaged in its business, caused the death of a passenger, or of a person in the exercise of due care who is not a passenger or in the employment of such corporation, it shall be punished by a fine of not less than five hundred nor more than ten thousand dollars, to be recovered by an indictment prosecuted within one year after the time of the injury which caused the death, which shall be paid to the executor or administrator, and distributed as provided in section one; but

a corporation which operates a railroad shall not be so liable for the death of a person while walking or being upon its railroad contrary to law or to the reasonable rules and regulations of the corporation, and one which operates an electric railroad shall not be so liable for the death of a person while so walking or being on that part of its railroad not within the limits of a highway. Such corporation shall also be liable in damages in the sum of not less than five hundred nor more than ten thousand dollars, to be assessed with reference to the degree of culpability of the corporation or of its servants or agents, which shall be recovered in an action of tort, begun within one year after the injury which caused the death, by the executor or administrator of the deceased, and distributed as provided in section one. If an employee of a railroad corporation, being in the exercise of due care, is killed under such circumstances as would have entitled him to maintain an action for damages against such corporation if death had not resulted, the corporation shall be liable in the same manner and to the same extent as it would have been if the deceased had not been an employee. But no executor or administrator shall, for the same cause, avail himself of more than one of the remedies given by this section."

"Section 9. If under section four or section seven damages are awarded for death or for injury and death, they shall be assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable.

"The amount of damages which may be awarded in an action brought under section seven shall not exceed five thousand dollars for both the injury and the death,

and shall be apportioned by the jury between the legal representatives of the employee and the persons who would have been entitled under section four to bring an action for his death." (See Acts 1927, Ch. 213.)

In *Hix* v. *N.Y.C.R.R. Co.*, 230 Mass. 309, which was for an action to recover for death of an employee under statute which is now G.L.c. 229, Sec. 3, at p. 312 the Court said:

> "The defendant railroad company was not a subscriber under the workmen's compensation act, St. 1911, c. 751; and it is argued by the plaintiff that the company is deprived of the defences of contributory negligence and assumption of risk on the part of the intestate, by virtue of the provisions of Part I, Sec. 1 of the act. On the other hand, the defendant contends that the railroad death statute, under which this action is brought, is not affected by the provisions in the workmen's compensation act dealing with the death of employees. Assuming, without deciding, that the defendant's contention is correct, nevertheless in this case there was ample evidence of the intestate's due care."

In *Oulighan* v. *Butler,* 189 Mass. 287, 295, it is said:

> "Although the plaintiffs rightly were allowed to go to the jury upon both issues, these grounds of liability have been held distinct in statutory actions against corporations operating railroads and railways for loss of life of one not being a passenger."

And in "*The Linseed King*" 48 F. 2d, 311, 316, the following language is used:

> "Of course, where employees of common carriers by railroad are injured or killed while engaged in interstate commerce, Congress has covered the entire field by the enactment of the Federal Employers' Act (45

U.S.C.A. s. 51-59), and state workmen's compensation statutes are excluded. *New York Central R. Co.* v. *Winfield*, 244 U.S. 147."

The Supreme Judicial Court of Massachusetts has said "It is thus seen, that, after the passage of the general act as to the liability of carriers in 1840 the Legislature enacted special statutes applicable to railroad corporations, which were inconsistent with the general act. *The Legislature could not have intended that railroad corporations should be liable under two inconsistent statutes covering the same subject.* (Italics ours.) The effect therefore of the latter special legislation was to repeal so much of the statute of 1840 as applied to railroad corporations, or, in other words, to take railroad corporations out of the operation of the earlier statute."

It is our contention, therefore, that the construction placed upon the provisions of Chapter 152, by the Supreme Court of Massachusetts, to the effect that railroads engaged in both interstate and intrastate commerce are amenable thereto, should not be accepted by this Court; and that in line with the general trend of similar legislation by other states and territories of the United States that it is more reasonable to except railroad companies engaged in either interstate or intrastate commerce, or both, as has been done by other states.

G. L. Ch. 152, Workmen's Compensation Act of Massachusetts:

"Section 53. Any mutual liability insurance company authorized to do business in this commonwealth may with the approval of the commissioner of insurance distribute its risks into groups in accordance with the nature of the business and the degree of the liability of injury and with like approval fix by and for such

groups in accordance with the experience of each group all premiums, assessments and dividends; but all the funds of the company both actual and contingent shall be available for the payment of any claim against the company.

"Section 54. Policies of workmen's compensation insurance issued or delivered in the commonwealth shall cover separately and for a separate consideration all the liabilities which are imposed upon an insurer by this chapter, whatever other contingencies may be insured by riders attached thereto or endorsements thereon. On the face of such policies shall be printed conspicuously the words: 'Insurance under this policy is in Class of the company's Workmen's Compensation Classification Manual,' and in the blank thus provided the number or other designation in said manual under which the said policy is written shall be placed before the policy is issued."

In the Armburg opinion at p. 1760, the Court said:

"If the defendant insures in conformity to the provisions of the act, it need not insure its employees so far as engaged in interstate commerce. It can gain whatever advantages arise from accepting the act by confining its insurance strictly to its employees to the extent they are engaged in interstate commerce. The defendant, therefore, would be required to pay premiums based not on its entire payroll, but only on the part of its payroll rightly allocated to intrastate commerce."

If it were within the range of human possibility to classify the employees of railroad companies engaged in both interstate and intrastate commerce for the purpose of securing the compensation for injuries as required by insurance

companies under the provisions of the Workmen's Compensation Act, it cannot be denied that the payment of premiums for such insurance would not avoid the payment of damages recovered in a suit under the provisions of the statutes of other states than those of Massachusetts, and in the case of the petitioner and other railroad companies with railroad employees engaged at piers and docks in connection with the handling of its business, the laws governing the rights of the parties would be exclusive of any state statute in most cases of injuries to its employees.

> "One purpose of the Workmen's Compensation Act was to *expedite relief* (Italics ours) to the employee and ascertainment of liability of insurer and to avoid the delay and expense of ordinary litigation to both the employee and others. That purpose would have been defeated by leaving to the employee the unrestrained option to pursue his common-law remedies against third persons and resort to the relief afforded by the Workmen's Compensation Act only in the event of defeat."
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> * * * * *
>
> "In this context it means that the employee cannot institute proceedings both at common law against the third person and under the Workmen's Compensation Act against the insurer. He must make a binding election. Resort to either form of relief constitutes such binding and final election, and he cannot thereafter pursue the other. It is not the usual case of election of remedies under doctrines of the common-law; it is an election under the provisions of a statute which specifies the conditions and terms of election."

Tocci's Case, 269 Mass. 221.

Also see

Ahearn's Case, 247 Mass. 512.

O'Hara's Case, 248 Mass. 31.

Bradford Electric Light Co. Inc. v. *Clapper*, 76 L. ed. 161.

McLaughlin's Case, Mass. Adv. Sheets, 1931, p. 243.

"In several instances jurisdiction under the Workmen's Compensation Act over an injury which might have been argued to be maritime in its nature was without the point being raised, discussed or thought of. Yet it is familiar law that a statute which would be unconstitutional as applied to a certain class of cases and is constitutional as applied to another class, may be held to have been intended to apply only to the latter class, if this seems in harmony with the general purpose of the legislature. *Atty. Gen.* v. *Electric Storage Battery Co.*, 188 Mass. 239, 241; *Manchester* v. *Popkin*, 237 Mass. 434, 440; *United States* v. *Standard Brewery, Inc.*, 251 U.S. 210, 220. The workmen's compensation act, therefore, must be and is interpreted as intended only to operate upon the classes of employment and injury within the jurisdiction of the General Court." . . . "Thus it is wholly optional with both the employer and the employee whether to become subject to the act or to stay out of it. Each has an absolute choice to act according to his own conceptions of his interests. Only when both concur in accepting it, does the act become operative."

Gillard's Case, 244 Mass. 47, 51-54.

See *Toland's Case*, 258 Mass. 470, 472-473.

In *Young* v. *Duncan*, 218 Mass. 346, at p. 349:

"The purpose of this act has been stated several times. Briefly, it was to substitute a method of accident insurance in place of the common law rights and liabilities for substantially all employees except domestic servants, farm laborers and masters of and seamen on vessels engaged in interstate or foreign commerce, and those whose employment is casual or not in the usual course of trade, business or employment of the employer, *and probably those subject to the federal employers' liability act.*" (Italics ours.)

and at p. 353: "The employee is not compelled to give up any common law or constitutional right. It is a matter of choice whether he avails himself of the one or the other. Reasonable provisions are made for the exercise of his election. *Foster* v. *Morse*, 132 Mass. 354.

The section is not open to objection as class legislation, or as denying equal protection of the laws. It applies to all employees alike. In this respect it is no more vulnerable than the employers' liability act, which establishes remedies for the benefit of employees, the weekly payment law or many other acts of like nature. *Opinion of the Justices*, 163 Mass. 589. *Commonwealth* v. *Riley*, 210 Mass. 387. *Sturges & Burn Manuf. Co.* v. *Beauchamp*, 231 U.S. 320, 326, and cases cited. *Chicago, Burlington & Quincy Railroad* v. *McGuire*, 219 U.S. 549. *Mondou* v. *New York, New Haven & Hartford Railroad*, 223 U.S. 1. *German Alliance Ins. Co.* v. *Kansas*, 233 U.S. 389. *Erie Railroad* v. *Williams*, 233 U.S. 685. The act is constitutional and is not open to criticism in the respects urged by the plaintiff."

Negligence of the employer not being essential to payment of compensation under Workmen's Compensation Act

and employers not excepted who fail to provide insurance for the payment of his employees of the compensation required by the act, are not liable for injuries to an employee if there was no negligence of the employer, which places such employers in the same category as railroads engaged in interstate and foreign commerce who would obtain no benefits if such employees were insured under the act. In other words, through no fault of the latter they are in no better position than the employer who can unquestionably insure but does not.

In *N.Y.C.R.R. Co.* v. *Winfield*, 244 U.S. 147, at pp. 153 and 154:

> "Only by disturbing the uniformity which the act is designed to secure and by departing from the principle which it is intended to enforce can the several states require such carriers to compensate their employees for injuries in interstate commerce occurring without negligence. But no state is at liberty thus to interfere with the operation of a law of Congress. As before indicated, it is a mistake to suppose that injuries occurring without negligence are not reached or affected by the act, for, as is said in Prigg v. Pennsylvania, 16 Pet. 539, 617, 10 L. ed. 1060, 1089, 'if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-

matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it.' Thus the act is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability. In other words, it is a regulation of the carriers' duty or obligation as to both. And the reasons which operate to prevent the states from dispensing with compensation where the act requires it equally prevent them from requiring compensation where the act withholds or excludes it."

In *Erie R.R.* v. *Winfield,* 244 U.S. 170, 174, it is said:

"It is beyond the power of any state to interfere with the operation of that act, either by putting the carrier and their employees to an election between its provisions and those of a state statute, or by imputing such an election to them by means of a statutory presumption."

In *C.R.I. & P. Ry.* v. *Schendel, Admr.,* 270 U.S. 611, in which there was an award under the Iowa Workmen's Compensation Act to a widow for death of an employee in Minnesota, under the Federal Employers' Liability Act, this Court held that the mere fact that the decision had been filed by a deputy industrial commissioner in a proceeding under the Iowa Compensation Act did not prevent an entry of judgment in the Minnesota action. The Iowa Workmen's Compensation Act is elective in form and as said in *Booth Fisheries Co.* v. *Industrial Commission of the State of Wisconsin,* 271 U.S. 208:

"A complete answer to this question is found in the elective or voluntary character of the Wisconsin Compensation Act."

It is our contention that although the Supreme Judicial Court of Massachusetts had defined the Massachusetts Act as elective in form, no election can be presumed or attached to a railroad company engaged in interstate and intrastate commerce, due to its failure to become an insurer under the Act for the reasons as set forth herein and, therefore, there can be no mutual consent between the employer and the employee to come within the terms of the Compensation Act as is necessary.

See *Gillard's Case,* 244 Mass. 47, 51.

Holcomb v. *Creamer,* 241 Mass. 99, 109-110.

> "If the Act is in fact compulsory in form there can be no question of contractual release which is applicable only to the elective form. We contend "The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer. . . . It therefore undertakes to solve but one half of the problem."

Adkins v. *Children's Hospital,* 261 U.S. 525.

The requirements of General Laws, Chapter 152, are different in form to other similar acts upon which this Court has been called upon to review in that although the 1911 Act provided for an Employees Insurance Association, insurance is by private mutual companies who are authorized to handle workmen's compensation; that as no state fund has ever been provided or any writing is required on the part of an employer accepting the provisions of the Act or securing liability; and that in most all of such acts that railroads engaged in interstate commerce have been specifically exempted; that we strongly urge this Court to reverse the judgment of the court below upon the grounds that to make the provisions of said Act applicable to the

petitioner and other railroad corporations engaged in interstate and intrastate commerce in Massachusetts amounts to an undue burden upon commerce between states and is, therefore, a violation of the Constitution of the United States in that respect.

Respectfully submitted,

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